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And Koil Content Creation Pty Ltd.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THAT ONE VIDEO
ENTERTAINMENT, LLC, a California
limited liability company,

Plaintiff,

v.

KOIL CONTENT CREATION PTY
LTD., an Australian proprietary
limited company doing business as
NOPIXEL; MITCHELL CLOUT, an
individual; and DOES 1-25,
inclusive,

Defendants.

Case No. 2:23-CV-02687 SVW
(JCx)

DEFENDANTS' REPLY BRIEF RE
MOTION TO DISMISS
COMPLAINT

HEARING DATE: July 17, 2023
TIME: 1:30 p.m.
COURTROOM 10A

Action Filed: April 10, 2023
Trial Date: Not Set

The question for the court to decide in ruling on this motion is whether Plaintiff has pled facts in the complaint sufficient to show a) an actual controversy between Plaintiff and NoPixel regarding the rights to the copyrights and b) a cause of action for breach of contract against Mitchell Clout individually. As the answer to both of these questions is "no," the motion should be granted.

1 With regard to the first cause of action for declaratory relief, Plaintiff's admit
2 in their Opposition that they have not pled adequate facts to state a claim. They
3 claim that this was not discussed in the meet and confer hearing (incorrect, as
4 discussed *infra*), but concede that if they had been aware of these arguments,
5 "Tove's counsel would have likely agreed to amend its allegations to more clearly
6 show that an actual and immediate controversy over Tove's claim to joint ownership
7 of the NoPixel Server does presently exist." Opposition, p.3:14-16 (emphasis in
8 original).

9 If Plaintiff believes, after reviewing the present motion, that it should have
10 added additional facts to the Complaint, then it should have simply filed an amended
11 complaint which Plaintiff has an absolute right to do and can still do.

12 "A party may amend its pleading once as a matter of course no later than . . . 21 days
13 after service of a motion under Rule 12(b), (e), or (f)." Fed. R. Civ. P. 15.

14 Plaintiff may certainly amend the complaint to try to correct the deficiencies in
15 its pleading and hopefully will file an amended complaint before the 21 days expires
16 so that the court does not have to spend time ruling on this motion. But as currently
17 pled, and as set forth in Defendants' Motion, there is no controversy at stake.

18 With regard to Plaintiff's claims that during the meet and confer call,
19 Defendants' counsel claimed that Defendants did not and were not planning to
20 dispute Tove's claim to joint ownership of the NoPixel server, this is incorrect.
21 Defendants counsel said no such thing.

22 What Defendants' counsel explained to Plaintiffs counsel during the call is not
23 that Defendants were conceding that Tove was a joint owner of the NoPixel server.
24 What Defendants counsel explained to Plaintiff's counsel is that NoPixel was not
25 making any claim to own the copyright to the content prepared by Tracey.

26 This is because the evidence will show that when Tracey began working for
27 NoPixel he agreed that while he would retain ownership of the copyright to the work
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1 performed, he was granting NoPixel a perpetual, irrevocable, unlimited, non-
2 exclusive license to use, publish or re-publish the content he contributed to the
3 server. Zerner Decl. ¶3.

4 Accordingly, NoPixel is not making any claim to own the copyright in any of
5 the content that Tracey contributed to the Server. It is NoPixel's position that all of
6 the content that Tracey contributed to the server is owned by Tracey (or by TOVE if
7 Tracey assigned the work to it). Therefore, there is no present copyright dispute
8 between TOVE and NoPixel. NoPixel will continue to use Tracey's content
9 pursuant to the license he granted, and Tracey and Tove are free to fully exploit all of
10 the work that he created.

11 At no point has NoPixel threatened to sue Tracey or TOVE for using Tracey's
12 content in other servers. As there is no current dispute or threatened dispute, there is
13 no actual controversy for the court to rule on.

14 **I. THERE IS NO PERSONAL CLAIM AGAINST MITCHELL CLOUT**

15 With regard to the claims against Mitchell Clout, Plaintiff has failed to
16 provide any rational argument as to why he was named individually in the lawsuit.
17 With regard to the Declaratory Judgment action, Plaintiff's sole claim is that the
18 pleading states that both NoPixel and Clout received money. Plaintiff does not
19 provide any context as to why this argument helps. Clout is NoPixel's founder and
20 owner and so, of course, at the end of the day, he receives money if NoPixel receives
21 money. But there is no allegation in the complaint that Clout owns the copyrights in
22 the NoPixel server in his individual capacity (and such allegation would be absurd).
23 The declaratory relief action is solely about determining copyright ownership. As
24 there is no allegation that one of the copyright owners is Clout, he is an improper
25 party to this cause of action.

26 With regard to the breach of contract cause of action, Plaintiff's argument is
27 even weaker. Plaintiff argues that there is a cause of action against Clout because
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1 the complaint alleges that Clout terminated Tracy's role with NoPixel. Plaintiff does
2 not bother to explain why this helps its case because it doesn't. The Complaint
3 alleges that there was a contract between TOVE and NoPixel. Complaint ¶12, 26.
4 Nowhere in the Complaint does it allege that Clout was a party to the contract. Even
5 assuming, *arguendo*, that Clout fired Tracey, why would this impose individual
6 liability against Clout? TOVE admits that Clout was not a party to the contract and
7 therefore he cannot be sued in his individual capacity for breach of the contract.

8 Accordingly, the Motion to Dismiss should be granted although if Plaintiff
9 really believes that it can fix the problems in the complaint by amending it, then it
10 should do so within the 21 day statutory time period so that the court's time is not
11 wasted dealing with this motion.

12 Date: July 3, 2023

MORRISON COOPER

13 By: /s/Larry Zerner

14 Larry Zerner

15 Attorney for Defendants Mitchell Clout
16 and Koil Content Creation Pty Ltd.

DECLARATION OF LARRY ZERNER

I, Larry Zerner, declare as follows:

1. I am the attorney for Defendants in this action, and I have personal knowledge of each fact stated in this declaration.

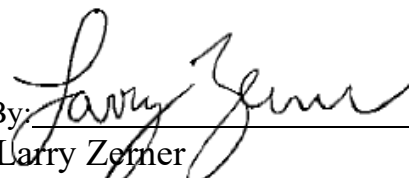
2. On May 24, 2023, I had a meet and confer conference with Plaintiff's counsel, John Begakis. Mr. Begakis identifies me in his declaration as "Larry Katz" for reasons that are unknown to me.

3. During our conversation, I explained to Mr. Begakis that it was Defendants position that there was no valid copyright dispute because NoPixel did not claim to own the content Tracey added to the NoPixel server. Instead, NoPixel's position was that Tracey retained ownership of his content but that Tracey had granted a perpetual, irrevocable, unlimited, non-exclusive license to NoPixel to use, publish or re-publish the content he contributed to the server.

4. At no point did I ever tell Mr. Begakis that NoPixel was not planning to dispute TOVE's claim to joint ownership of the NoPixel or that Defendants were "waiving the white flag." I do not know why he states this in his declaration, but as he misstates my name in the declaration, perhaps he did not hear me correctly.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of June 2023 at Los Angeles, California.

By: 
Larry Zerner
Attorney for Defendants Mitchell Clout
and Koil Content Creation Pty Ltd.